Guardian Automotive Trim, Inc. *and* International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO. Cases 25–CA–27095–1 and 25–RC–9933

March 12, 2002

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN HURTGEN AND MEMBERS COWEN AND BARTLETT

On December 28, 2001, Administrative Law Judge Robert A. Pulcini issued the attached decision. The General Counsel filed limited exceptions and a supporting brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions as modified[2] and to adopt the judge's recommended Order as modified and set forth in full below.[3]

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 3:

"3. By threatening employees with loss of a planned bonus program, wage increases, and a plant air-conditioning project; by telling employees that collective bargaining would be futile and would inevitably lead to strikes; by telling employees that collective bargaining would start at 'zero'; by threatening employees with loss of the Respondent's 'open door policy' if the Union was successful; by telling employees that job losses would result from unionization; and by prohibiting employees from distributing union literature during nonwork time in the employee parking lot, the Respondent engaged in unfair labor practices within the meaning of Section 7, Section 8(a)(1), and Section 2(6) and (7) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Guardian Automotive Trim, Inc., Evansville, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with loss of a planned bonus program, wage increases, or a plant air-conditioning project should they choose International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, or any other labor organization as their collective-bargaining representative.

(b) Telling employees that collective bargaining would be futile and would inevitably lead to strikes.

(c) Telling employees that collective bargaining would start at "zero."

(d) Threatening employees with loss of the Respondent's "open door policy" if the Union is successful.

(e) Telling employees that job losses would result from unionization.

(f) Prohibiting employees from distributing union literature during nonwork time in the employee parking lot.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Evansville, Indiana, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 23, 2000.

[1] In his exceptions, the General Counsel seeks only to conform the judge's conclusions of law, recommended Order, and notice to his findings, and to add the Union's complete name to the notice. The Respondent filed no exceptions, and we adopt the judge's decision pro forma. The Respondent submitted a letter stating that it does not oppose the General Counsel's exceptions.

[2] We shall modify the judge's Conclusion of Law 3 to conform to the violations found. In addition, we correct an inadvertent error in sec. IV,C, par. 2 of the judge's decision by deleting "3, 4, 5" from the list of objections the judge found meritorious. In a prior section of his decision entitled "Alleged Objectionable Conduct," the judge discussed Objections 3, 4, and 5 and concluded that they lacked merit because they were based on the same conduct as the alleged 8(a)(3) violations, which the judge found unsupported by the evidence.

[3] We shall modify the judge's recommended Order and substitute a new notice to correct inadvertent errors and to conform to the violations found and our recent decision in *Ishikawa Gasket American, Inc.*, 337 NLRB No. 29 (2001).

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with this Order.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the election held on April 27, 2000, is set aside and that Case 25–RC–9933 is severed from Case 25–CA–27095–1 and remanded to the Regional Director for Region 25 to conduct a new election when he deems appropriate.[5]

[Direction of Second Election omitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten employees with loss of a planned bonus program, wage increases, or a plant air-conditioning project should they choose International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, or any other labor organization as their collective-bargaining representative.

WE WILL NOT tell employees that collective bargaining would be futile and would inevitably lead to strikes.

WE WILL NOT tell employees that collective bargaining would start at "zero."

WE WILL NOT threaten employees with loss of our "open door policy" if the Union is successful.

WE WILL NOT tell employees that job losses would result from unionization.

WE WILL NOT prohibit employees from distributing union literature during nonwork time in the employee parking lot.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

GUARDIAN AUTOMOTIVE TRIM, INC.

[5] The Notice of Second Election should include language informing employees that the first election was set aside because the Board found that certain conduct by the Respondent interfered with the employees' free choice. *Lufkin Rule Co.*, 147 NLRB 341 (1964).

Joanne C. Mages and *Kimberly R. Sorg-Graves, Esqs.*, for the General Counsel.

Robert G. Brody and *Scot Plotnick, Esqs. (Brody & Associates)*, of Stamford, Connecticut, for the Respondent.

Gary Wise, Esq., of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. PULCINI, Administrative Law Judge. This case was tried in Evansville, Indiana, on March 19, 20, and 21.[1] The charge in Case 25–CA–27095–1 was filed by the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers (IUE), AFL–CIO (Union) on May 16, 2000, amended respectively on June 7 and July 14, alleging that Guardian Automotive Trim, Inc. (Respondent) violated Section 8(a)(1) and/or (3) of the Act, inter alia by threatening employees with wage and benefit losses for supporting the Union; by negatively distorting the nature and effect of collective bargaining upon Respondent's employees; by imposing a nonsolicitation rule to prevent employees engaging in activity on behalf of the Union at or near the Respondent's place of business; by failing or refusing to issue scheduled wage increases or bonuses or implement certain beneficial environmental changes at its plant because of the Union's organizational campaign. The complaint issued on December 14.

On May 3, the Union filed timely objections to an election held on April 27. On December 19, the issues raised in these objections were consolidated with the alleged unfair labor practices, as outlined above, for resolution.

ISSUES

Whether the Respondent violated Section 8(a)(1) and (3) of the Act. Whether the Respondent's conduct constitutes valid objections to the conduct of the representation election that was held. What remedies, if any, are warranted including those of special consideration?

The parties were given full opportunity to present evidence including the examination of witnesses, the presentation of other evidence, and argument. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

[1] All dates are in 2000 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, manufactures injection-molded plastic parts for the automotive industry at its facility in Evansville, Indiana, where it annually ships to and receives from points directly outside of the State of Indiana goods valued in excess of $50,000. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent maintains offices in Warren, Michigan. It has a number of Midwest plants engaged in manufacturing various components for the auto industry. The Evansville facility where the relevant events of this case take place is only a few years old. This facility is a three-shift operation.[2] The essential design of the production operation consisted of molding, plating, and finishing departments. There were also maintenance, shipping, and receiving departments. As of April, there were approximately 400 employees at the facility.

In January the Union began an organizing campaign at the Evansville facility. The Union filed petition for an election on March 17, and the election was held on April 27. Between these dates, the Respondent conducted between 70 and 75 meetings to counter the Union's organizational effort. The meetings were held at various locations within the facility, at various times. The employees were gathered in groups of 15 to 20 employees. The meetings were arranged by shift, but the grouping of the various employees changed with each meeting. Various management officials attended. The then plant manager, Michael Birch, was the spokesperson for the Respondent.

The first sets of meetings were held on March 23 and 24. These were held in the facility training room or large conference room. Birch had a scripted presentation to make, but seldom stuck to this, if at all. After March 23 and 24, there was an additional set of six meetings held during which videos were played and questions and answers allowed. The statements of Birch are the nucleuses of the alleged violations of Section 8(a)(1). Between March 8 and 17, the date the petition for an election was filed, the Union collected 176 authorization cards. After March 23, the Union obtained only one additional card. There was also a dropoff in attendance at organizational meetings.

Nine employees testified about the meetings held on March 23 and 24.[3] Respondent's campaign was intended to be a planned exercise of tried and true tactics staying within the boundaries of acceptable and lawful behavior. It failed in execution because Birch repeatedly engaged in extempore remarks resulting in the issues in this case.[4]

Eight other employees testified on behalf of Respondent as to the same events of March 23 and 24.[5] In the investigation and preparation of their respective cases, the parties in this case took various forms of written witness statements. Much of this became the subject of controversy during the hearing and was used in cross-examination to call into question the reliability of witnesses. Respondent challenges the facts of these witness statements as inherently suspect. It argues that union organizer Ann Hodges prepared these well after the fact of the event. Hodges advised various employees on what she viewed as lawful. She told them that what was told the Union would be used to get a new election. Respondent sets out additional reasons why this evidence is unreliable and why, therefore, the testimony of these witnesses should be discounted in its entirety.

Respondent argues that what it calls the group statement is inaccurate. Of the approximately 20 persons who signed it, 6 testified and 2 repudiated portions of it.[6] One of these even repudiated his purported signature.[7] Respondent points out that some individual employees drafted the statements like Hodges, following group discussions with employees. Some signatories were not even present when the statements were drafted but signed them notwithstanding. In some instances, facts were added to these joint recollections and then adopted by the signatories. Respondent urges that these facts along with the length of time that elapsed before the purported recollections were consigned to writing are inherent markers of unreliability.

All of these points of contest are valid exercises in the impeachment of witnesses. I considered them in the overall context of the issues of this case, noting in doing so, that Respondents' view of this case as turning on credibility is largely correct. The manner that a witness reveals recollection in sworn testimony is a ripe and necessary area of inquiry. However, there is no formulaic process by which impeachment of testimony is achieved. Yet, the testimony of sworn witnesses cannot be totally discounted simply because their recollections of an event were put to writing later by someone else. Accordingly, I reject the singular attempt to attack credibility on the general basis of how statements and recollections were procured. Rather, I look to the entire context of the purported statements and how the individual witnesses appeared in testimony in context to the issues and the objective facts and reality of the case.

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[2] 7 a.m. to 3 p.m., 3 to 11 p.m., and 11 p.m. to 7 a.m.

[3] These employees are Richard Young, Larry Sutton, Anna Bentley, Philip Redmond, Rex Truitt, Mark Keller, Debbie Reynolds, Dannella Loveless, and Bruce Carter representing various departments.

[4] Michael Birch never testified. He was fired from his position as plant manager by Respondent and not produced as a witness leaving the parties in this case to attempt to define what Birch may or may not have said in the meetings on March 23 and 24.

[5] Employee Relations Manager Floyd Tresler, Project Manager Michael L. Dombrowski, Molding Department Manager Clifton D. Presley, Manufacturing Vice President Jimmy Thompson, Group Leader Cathy Baggett, Material Handler Cynthia Neidig, Human Resource Secretary Tamara Lynn Forcum, and Plant Manager David W. Bacon.

[6] Mark Keller and Rex Truitt testified on cross that, they did not hear what Respondent calls the "Repudiation Speech" of Mike Birch on April 13.

[7] Rex Truitt stated the signature at the bottom of the group statement was not his.

A. Violations of Section 8(a)(1)

1. The air-conditioning and bonus allegations and the repudiation

Birch conducted all of the meetings of the employees. The overwhelming number of meetings that they attended and the volume of text that Birch delivered in this case muddled the recollections of all witnesses. However, Respondent admits that Birch told employees that the Respondent could not air-condition the plant because it would look like a bribe. This occurred at one of the meetings held on March 23 or 24. Respondent makes no argument with respect to the threats made concerning a bonus that employees were scheduled to receive. A number of witnesses testified to what Birch said in these regards and about the air-conditioning issue.[8] Respondent introduced evidence that air-conditioning of the facility was a long planned, complex project that could not, in any case, have been put on-or-off line easily irrespective of what Birch told employees.

I find that the evidence is persuasive that Birch told the employees that their bonuses were jeopardized because of the union campaign and that the air-conditioning was not forthcoming for the same reason. In this, I am swayed by the admission of the Respondent that Birch made the remarks about the air-conditioning. Given that admission, I find it supports the statements of the various employee witnesses that Birch went on to say that bonuses would not be given because of the union campaign.

On April 14, 2 weeks before the scheduled election, Birch held a series of meetings intended to cure the consequences of his comments about the bonuses and the air-conditioning.[9] Respondent prepared a text for him to read to the employees in another series of captive audience meetings. It was important enough that it carried in bold face, large underlined type "To be read exactly as written." It said as follows,

> I made a mistake and I want to tell you about it. Two weeks ago, I told you that, to avoid any unfair labor practice charges, we would not give the new performance bonus we told you about in February. I also said the air-conditioning project would be put on hold. I thought this was what the law required but I just learned I was wrong. I apologize. Furthermore, on behalf of Guardian, I assure you that we, in no way, intended to or will interfere with your rights under the law including your right to join or not join a union. Just so you know how serious we are about this, we are telling each and every person in our plant about this. We want everyone to know the facts. Now speaking of the bonus. Back in February, we told you we would present a new performance-based bonus program. Under this program, a bonus may be paid twice a year based on attendance, scrap and safety standards. Well, since I now know we were wrong to put off the new bonus program, we will go back to our original plan. And I assure you that regardless of the outcome of the April 27th election, we will implement the new bonus program and it will be retroactive to April 1. Right now we are working out the finer (sic) details of the program and will be ready to give you all of the details in May. Likewise, the air conditioning project is continuing. As soon as we have more details, we will let you know. We are happy about this turn of events and look forward to this new bonus program and a cooler, more air-conditioned plant. Thank you for your time. Any questions?

The Respondent urges this is a clear repudiation of any possible violative comments Birch made about bonuses and air-conditioning. Seven employees testified about this series of meeting in April. Of these, only one was able to recall an admission of wrongdoing and an apology from Birch.[10] The remainder of the witnesses, both the General Counsel and Respondents, are clear in their recall that Birch did not read directly from the text. His speech made little reference to Section 7 rights of employees.[11] This attempt to correct the threats about bonus and air-conditioning weeks failed to do so because of the manner, timing, and method of transmission. Birch's predilection for off-the-cuff comments continued in these meetings.

2. The threat of a lost wage increase

In the meetings of March 23 and 24, Birch told the employees that they would not receive a scheduled wage increase. Employees Anna Bentley, Deborah Reynolds, Dannella Loveless, Larry Sutton, Bruce Carter, and Mark Kellar each testified to statements about wage increases. These are variously, "We've got the union activities and the petition and we will not be getting our raise. We would have our wages and bonuses on the next check, but it was going to be halted because of the petition that the union had organized for a vote. The raise that was going to be in our next paycheck would not be because of the papers filed by the union. Employees are supposed to get a raise in the next few weeks but were not going to get it because of the employees attempt to organize. Employees would not be given a raise until the company saw the outcome of the election."

Respondent cross-examined each witnesses at length as to their interpretation of what they recalled Birch saying. I find

[8] Anna Bentley testified in a forthright and direct manner that Birch said that there was a bonus scheduled but due to the union activities, the employees would not be getting the bonus. Similarly, Mark Keller credibly testified that he (Birch) told them that he was going to have to use the resources and time that were going to be the employee bonuses to fight the Union. Keller said Birch told the employees that he could not submit the air conditioning proposal because he would be sent to "some third world glass company."

[9] I have construed this as a tacit admission that the Respondent was aware that Birch had crossed the line of acceptable remarks at least as to the bonus and air conditioning issues.

[10] Cynthia Neidig did not support the Union and repudiated in her testimony her affidavit given months earlier alleging that no apology had been made by Birch. I have placed little reliance in Neidig's recollections. Her testimony was too precise. It had a rehearsed quality about it and conflicted greatly with the other employee accounts.

[11] Birch did manage to convey that employees would receive their bonuses and that the air-conditioning would proceed as planned. Different employees testified to different recollections in this regard highlighting the repeated departures Birch made from the rubrics of the alleged repudiation speech.

this to be largely irrelevant exercise. Witnesses' recollection was sufficiently precise and informative for me to credit their respective testimony. Birch embarked on a program to dissuade union activity. His text changed from meeting to meeting, but its message was always the same. Involvement in union activity would lead inexorably to the curtailment of some employee benefit.

3. Comments concerning the futility of collective bargaining

A number of employees variously testified that Birch told employees that collective bargaining was an exercise in futility. Employees Richard Young, Larry Sutton, Anna Bentley, Philip Redmond, and Deborah Reynolds testified to various recollections of Birch's comments. The gravemen of their testimony is that collective bargaining was characterized as a system of loss with the company and Birch at its epicenter. I credit the testimony given. It was consistent. Cross-examination failed to damage the credibility of any of these witnesses on this issue. While specific recollections varied reflecting the extempore conduct of Birch, Respondent did not produce any witness to adequately refute them.[12] I conclude that the evidence establishes Birch conveyed the message that collective bargaining is a futile exercise in which the employer has the ability to negate all that the union might try to achieve. In doing so, I have looked at the entire content of the meetings as recalled.[13]

4. Statements negotiations start with "zero"

Five employees essentially testified that Birch told them that bargaining negotiations would start at "zero."[14] In reviewing this issue, I have again looked to the overall intent of the meetings conducted by Birch, which was antiunion. The testimony of these witnesses was consistent enough and clear in expression for me to credit their respective versions of what was said by Birch. The only affirmative witness called by the Respondent was Floyd Tresler.[15] The evidence supports my finding that Birch made a variety of statements conveying the message that collective bargaining begins with "zero" as a baseline.

5. Statements about the inevitability of strikes

Three of the employees testified that Birch made comments concerning strikes at the facility. Larry Sutton testified Birch said "Many of us have mortgages and how are we going to pay it on strike because he would not agree to anything." Birch also said there would be strikes. Dannella Loveless similarly recalled Birch saying there "would be a strike," while Richard Young remembered Birch saying, "Sooner or later it is inevitable that the union would call a strike." I previously found that these witness recollections reasonably reliable and trustworthy. Similarly, I place little reliance on the contrary recollections of Floyd Tresler on these accounts.[16] Birch clearly sought to convey to the employees that collective bargaining and "strikes" go hand-in-hand. These credited comments are in concert with my previous findings.

6. Threats of job loss

One employee testified to Birch making statements concerning job loss in the event of unionization.[17] Another recounted a one on one conversation with Supervisor Cliff Pressley.[18] I attribute this statement as being made. Birch's conduct in the many meetings compels a conclusion that he made a statement linking unionization to job loss. On the other hand, the single statement made by Supervisor Pressley does not have the sense of certitude that would lead me to find that this alleged statement was, in fact, made, or any of the other comments alleged to have been made in that contact.

7. Threats to stop the "open door policy"

Respondent had a self-described "open door policy," set out in its personnel policies. One employee testified to Birch telling employees that if the Union got in the policy would end.[19] The evidence is sufficient, taken as a whole, for me to conclude that Birch told employees that unionization would end what appeared to be a beneficial policy for the employees.

[12] Floyd Tresler testified at length. His recollections of Birch's comments were a mix of certitude and vagaries. I found this unreliable. His testimony did little to mitigate the overall impression that the meetings were threatening in content.

[13] This case requires the isolation of specific statements and their analysis. However, the overall reality of each meeting carries with it a certain message. In the falling dominos of threat after threat, the evidence becomes more concrete that the purpose of the meetings held by Birch had a clear unlawful intent and result.

[14] Employees Richard Young, Larry Sutton, Anna Bentley, Philip Redmond, Debbie Reynolds, and Dannella Loveless each testified to some variation of the "zero" comment. On cross-examination, each of these witnesses gave some different interpretation of what they thought Birch meant. Nonetheless, the basic message remained the same that unionization imperiled all that the employees possessed in wages and benefits.

[15] As stated before, I put little credence in Tresler's recollections. The vagueness of his testimony was only relieved by explicit recollections of exculpating statements by Birch. There is nothing in the broad scope of the evidence of this case to indicate that Birch was capable of such statements or that I should place any reliance on Tresler's recollections of these.

[16] In this case, it is not clear that Tresler was even present at the meetings these employees testified about. Rather his testimony presents his recollections of a concise, well prepared, rational presentation by Birch, totally at odds with the reality of the evidence.

[17] Dannella Loveless recalled a meeting held on or about March 30 wherein Birch stated that a successful union campaign would result in employee's loss of jobs. Loveless had a clear recollection that Birch spoke of the company customers purchasing parts from Mexico because of the higher costs caused by the Union. Her cross-examination failed to shake the substance of her recall on this issue. Conversely, Floyd Tresler had no specific recollection on this question other than to insist in his testimony that the content of the statements was lawful.

[18] Deborah Reynolds testified to a lengthy conversation with Pressley during a breaktime on April 5. Purportedly, in this conversation, Pressley is alleged to have commented that Reynolds could lose her job over the union situation. In testimony at hearing, Pressley denied the allegation. In assessing this issue, I found Pressley to be the more credible witness. His demeanor was unrehearsed and the content of his statements had a sense of reality to them that I did not find in Ms. Reynolds on this question.

[19] Daniella Loveless testified specifically that Birch said the door would be slammed shut in the event of unionization. Loveless's testimony stands essentially unrefuted. Accordingly, I credit her account finding it consistent with other statements of Birch.

8. Stopping employee union solicitation

On April 20, Floyd Tresler stopped two employees, Philip Redmond and Rex Truitt from distributing union literature during nonworking time in the employee parking lot. It is undisputed that the Respondent had no policy regarding solicitation at the time. Tresler told them to stop and they did. Tresler then conferred with labor counsel and appears to have been told that his actions were inappropriate. Tresler testified that the next day, he saw six employees distributing literature at the same locale and informed them that this was permissible.[20] Respondent offered no real defense to this allegation other than Tresler permitting solicitation after the event. Tresler's imposition of a no solicitation rule was, therefore, inappropriate and unlawful.

B. Violations of Section 8(a)(3)

1. The failure or refusal to issue a scheduled wage increase

Respondent had a policy of giving-across-the board increases in June or July of each year. The General Counsel alleges that the Respondent failed to give a wage increase because of union activity, but the evidence fails to support this. Tresler testified that there were no plans to give a wage increase other than that usually scheduled. Jimmy Thompson, Respondent's vice president of operations had approval authority for all across-the-board increases and that the only one scheduled was the June or July 1.[21] Various witnesses called on this issue attribute the reality of this increase to statements made by Birch. Each of them remembered some variant of this message that, as I have found, communicated a threat. A threat to withhold an increase does not, however, make it a reality. There is no evidence to support the allegation that Respondent actually withheld a wage increase because of the union activity at its facility.

2. The failure or refusal to issue a scheduled series of bonuses

Respondent had a bonus system in place that generally paid out in June and December. In 1999, Respondent paid no bonus in December. In 2000, the Respondent modified its bonus plan with a formula that took into account attendance, safety, and scrap with an intended payout in June and December.[22] Respondent published this program in May. It told employees that the June bonus would cover the period from March through May. Three present and former employees testified on this issue.[23] Shirley Grider, former executive assistant to Birch, was the primary witness for the General Counsel on this issue. Her account of preparation of spreadsheets in January, February, and March dealing with bonuses forms one alleged basis for the allegation that they existed before June. The other is Birch's comment to Grider that he told her to hold off on the bonus program because "the employees wanted a union."[24] None of this evidence is especially probative or weighty enough to carry the burden of persuasion. It does not, in my view, support a finding that a bonus was planned for release in the period from January through March. Moreover, Respondent's witnesses were more credible that the bonus remained as a June payout, even when altered.[25]

3. The delay in air-conditioning the facility

Respondent's facility is an extensive one of approximately 400,000 square feet. In 1997, the facility obtained a bid for air-conditioning but the project was dropped. In November 1999, the project was revived. In February, a letter was sent to employees announcing we hope to have final approval on air-conditioning by the end of March. This was before Respondent knew of the union campaign effort. Respondent had one primary witness testify in this regard.[26] The General Counsel relies on the threat that Birch made about this in the captive audience meetings to make its case. However, Birch's threat to delay this project falls short of proving that he delayed it. The project was budgeted for $4 million with an estimated completion time of 12 to 24 months. The equipment alone was expected to take 20 weeks to deliver after approval of the project design. The project had a life of its own. More importantly, there is no evidence that Birch had any power or authority to influence the course and conduct of it. Respondent's argument that the project completion by the end of the summer of 2000 was an unattainable reality is credible and precisely on point. The gist of the General Counsel's case is that Respondent was dilatory in pursuing this issue from March 17 through May 4, because of the union campaign and issues surrounding it. This view assumes this construction project had a railroad-like timetable. It is a view that I find overly optimistic and unrealistic, given the size and cost of the project itself. Rather, the evidence is persuasive that the air-conditioning plans were unaffected by the union campaign in any way. Respondent did not, therefore, violate Section 8(a)(3) in any alleged delay of those plans.

[20] Tresler did not identify these employees.

[21] On this issue, I credit Tresler's testimony. The past practice of wage increases in June or July of each year is an uncontested fact. Similarly, I found Jimmy Thompson to be a credible witness on this same issue and accept his claim that no increase was planned for March.

[22] It was not alleged and I find no evidence other than timing to indicate that the change in the system was caused by the appearance of the union organizational campaign.

[23] Employees' Dannela Loveless and Bruce Carter testified that they received a bonus in June. Loveless thought the bonus covered 6 months and Crater testified to that same impression. Their testimony merely corroborates the fact of the bonus adding nothing to the resolution this issue.

[24] Grider also testified that Birch said the employees had disrespected him and that he was not going to pay any bonuses. Grider was Birch's paramour and has a pending sex discrimination suit against the Respondent because of her discharge. Her testimony was delivered with a hostile and vengeful demeanor in which I place little reliance. Grider had major motives to exaggerate and dissemble. I cannot accept her account of what transpired between her and Birch for these reasons.

[25] Human Resource Secretary Tammy Forcum testified that she prepared all bonus data relative to bonuses. Jimmy Thompson, as stated above testified credibly that he was responsible for bonus approval and did not delay any planned bonuses that year. Both witnesses in testimony appeared reliable and trustworthy in their accounts. Consequently, I give their versions controlling weight on this issue.

[26] Mike Dombrowski, corporate project manager, testified on the details of the project. He was authoritative, precise, informative, and convincing that the size of the project meant a long process of equipment purchase and construction and installation to retrofit the facility.

III. ALLEGED OBJECTIONABLE CONDUCT

The Union's objections to the election mirror the alleged unfair labor practices. There were 11 specific objections filed, of which numbers 2 and 9 were withdrawn before hearing. Objections 1, 3, 4, 5, 6, 7, 8, 10, and 11 reflect paragraphs 5(a)(1), (ii), (iii), (iv), (v), (vi); 5(b)(1), (ii), (iii), (iv); 5(c); 5(d); 5(e), (i), (ii), 5(f); 5(g)(1), (ii); 6 (a); 6(b); 6(c); 6(d); 7; and 8 of the complaint. Of these, consistent with my discussion and findings as to the 8(a)(1) violations, there is merit to Objections 1, 6, 7, and 10. Objection 1 is "The Employer, by its agents intimidated eligible voters with loss of employment if they supported the union." Objection 6 is "The employer, by its agents, informed employees that if they selected the union to represent them, bargaining with the union would be futile." Objection 7 is "The Employer, by its agents, interfered with, restrained, and coerced its employees in the exercise of their rights under Section 7 of the Act by informing employees that a strike was inevitable if they voted to be represented by the Petitioner." Objection 10 is "The Employer imposed a discriminatory, no-distribution rule on the employees designed to interfere with the conduct of the election." Objections 3, 4, and 5 track the 8(a)(3) allegations of the complaint. In these, there is no merit consistent with my previous discussion and findings. The remaining objections in issue are respectively, Objections 8 and 11.

A. Objection 8

The Union alleges that Anna Bentley was assigned more onerous work than other employees were by Supervisor Cliff Pressley. As Respondent pointed out in its brief, there was no substantiation for this claim by Bentley. Pressley denied making any changes in the assignment schedule regarding Bentley. Both Bentley and Pressley seemed credible in their presentation of accusation and denial. But, Bentley's inability to specify how she was wronged left the impression that the allegation was more perception than reality. Given her role as union activist and the heightened tensions in the facility overall, it would logically follow that the normal routine of the plant might be perceived inaccurately. This appears to have been the case here. The lack of any corroboration leads to a conclusion that this objection is meritless.

B. Objection 11

During the period before the election in early April, Respondent sent what it called a rotating group of human resources experts to the facility from its other plants.[27] Two of these individuals are alleged to have spoken to the employees about the Union. The Union alleges that the presence of these individuals created a coercive atmosphere in the facility. These persons went into the facility and into the work areas and were seen by the employees. The evidence is that two of these persons had conversations about the union and its campaign. But the content was not alleged as any violation of Section 8 (a)(1). The evidence fails to show that the presence of these persons in the huge operation of the plant unlawfully affected what transpired. The allegation is so unsupported by tangible evidence that it utterly fails to show how it may have been as an objectionable act.

[27] In this group were Sabreena Kaye, human resources manager, Joannie Andres, benefits administrator, Kim Flisnik, human resources manager from another plant, Sandra (last name unknown). Also sent were Shelby Evans, Zach Cummings, David Bacon, and others not named.

IV. ANALYSIS AND CONCLUSIONS

A. The Alleged 8(a)(1) Violations

Birch's actions are the heart of the misconduct in the captive audience meetings. He was the proverbial loose cannon. Respondent could not rein him in or prevent him from saying what he is alleged to have said. It is true that the recollections of many of the witnesses varied in exactness and content. Often in testimony, points were made on cross-examination that seemingly took the sting out of that person's recollections. However, in looking at this evidence in totality, the overwhelming impression is Birch did threaten the employees in the manner described and that these statements were coercive in their result.

The generally accepted test to determine whether statements by an employer violate Section 8(a)(1) of the Act is whether the employer engaged in conduct which reasonably tends to interfere with, restrain, or coerce employees in the free exercise of rights under the Act. *Williamhouse of California, Inc.*, 317 NLRB 699, 713 (1995). There is an additional point that underscores this view. It is best expressed as the economic dependence of the employees on their employers, and the necessary tendency of the former . . . to pick up the intended implications of the latter that might be more readily dismissed by a more disinterested ear. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

Birch wanted his comments to cripple the Union's campaign. Respondent intended them to be the lawful exercise of its right to speak its message. Birch was its worst possible messenger. I also note the compression of events as a factor in this case. The employees were marshaled into the captive sessions repeatedly over 2 days. Intended or not, the obvious stresses that surround such encounters were logically magnified, as was the undoubted effect of the meetings content. Birch peppered his speech with random but repeated threats and unlawful statements. Whatever lawful content existed was sandwiched among various unlawful statements.

The threats to withhold an employee bonus and stop the air-conditioning of the plant, because of the Union were admitted by the Respondent as a mistake. As argued by General Counsel, such threats go to the very heart of the exercise of Section 7 rights. *R&S Truck Body Co.*, 333 NLRB 330 (2001). The only question is Respondent's assertion that it delivered an effective repudiation of them. There is a precise analytic standard for repudiation of unfair labor practices. Both Respondent and General Counsel articulated this standard citing *Passavant Memorial Hospital*, 237 NLRB 138 (1978). Repudiation must be "timely," "unambiguous," "specific in nature to the coercive conduct." *The Scott & Fetzer Co.*, 228 NLRB 1016 (1977), and cases cited therein at 1024. Additionally, it must set forth assurances to employees that no interference with their Section 7 rights will occur in the future, and in fact there must be no

unlawful conduct by the employer after the publication of the repudiation." See also *Gaines Electric Co.*, 309 NLRB 1077, 1081 (1992).

Respondents' repudiation fails. It was untimely, occurring weeks after the presentation of the threats, and delivered in a less diligent fashion than the threats themselves. Also, I credited the various that Birch made little to no mention of Section 7 rights of employees. For all of these reasons, no effective repudiation took place. Respondent's threat to withhold a wage increase because of unionization, which I found, is a classic coercive act striking the exact center of the economic dependence relationship of employees with their employer.

In this same vein, statements that Respondent would reject all of the Union's proposals and say no to everything the Union asked for combined to convey the futile nature of unionization to the employees. Respondent argues that such statements are lawful. Birch, it says, merely informed employees of the risk of strikes and the inherent risks of negotiations. I do not agree that the facts support this interpretation. During an election, employers are free to inform employees about how negotiations work and to explain how an employer is free to disagree with a union's proposal *Histacount Corp.,* 278 NLRB 681, 689, 690 (1986). An employer also may tell its employees that benefits might be lost in the give and take of bargaining. See *BI-LO,* 303 NLRB 749 (1991), enfd. 985 F.2d 123 (4th Cir. 1992). However, statements about the process of negotiations are unlawful if they suggest that the employer will adopt a punitively intransigent bargaining strategy in response to a union victory. *Histacount Corp.,* supra; *Coach & Equipment Sales Corp.,* 228 NLRB 440, 441 (1977). Birch exceeded the constraints of lawful speech in the context of what he said and how he said it. In the cold light of analysis, his comments fall short of what is allowable under *Histacount Corp.,* supra. Instead, its message was reprisal, communicated all too well, a message which put his remarks over the brink. See *Reeves Bros.,* 320 NLRB 1082, 1083 (1996), and cases cited therein.

The General Counsel contends that Birch's statements that the Union would start at zero violate Section 8(a)(1) citing *Noah's Bay Area Bagels,* 331 NLRB 188 (2000). Respondent argues that employers are permitted to say bargaining starts from zero as long as employers assure good faith bargaining and do not say that employees will automatically lose what they currently have, aggressive campaigns on the risks of bargaining are legal. Respondent's argument would have weight if the statement existed in some different environment than this case. Inasmuch as it was made in conjunction with other 8(a)(1) statements, their bad faith attaches and it too becomes a violation. *Noah's Bay Area Bagels,* supra; *Tufts Bros.*, 235 NLRB 808 (1978).

I reach a similar result in the allegations concerning the inevitability of strikes and the threat of job loss as an adverse consequence. Here again, Respondent says it engaged in the lawful exercise of discussing "possibilities, not inevitabilities." However, when these statements are married to those conveying various threats with the futility of bargaining, the message is unionization means inevitable strikes with loss of jobs and that is unlawful. *Long-Airdox Co.,* 277 NLRB 1157, 1158 (1985).

Respondent states telling employees that an open door policy ends with unionization is not an 8(a)(1) violation. The General Counsel, with whom I agree, argues the opposite. Each cited the same case in support of their positions. *Ben Venue Laboratories,* 317 NLRB 900 (1995). I agree with the General Counsel's interpretation. The statement was delivered contemporaneous with others I have found as violations of Section 8(a)(1). Given that context, its commingling changes what might otherwise be a harmless expression of right into a threat.

Similarly, the stopping of employee solicitation also is an unlawful act. Respondent did not contest this evidence referring to it as a mistake. Respondent seeks to distinguish this mistake from an unlawful act by arguing the short span of time of its commission, some 10 minutes relative to all the other events. I am unimpressed by this argument. The event occurred outside in the plant parking lot. I infer the strong possibility that other employees saw Tresler stop the lawful handbilling, as I do that Tresler's subsequent acts did little to change the damage he might have been caused. As the General Counsel points out, it was not justified and therefore unlawful. *Tri-County Medical Center,* 222 NLRB 1089 (1976).

B. The 8(a)(3) allegations

The 8(a)(3) allegations relating to the withholding of a scheduled bonus; the delay in the air-conditioning projects and the withholding of a wage increase are supposed to reflect the incarnation of threats made by Birch as found above. But, the evidence of this record does not support that any of these events actually took place. The bonus system was revised but never withheld. The revision was not alleged as unlawful. In the case of the air-conditioning of the plant, no evidence was adduced to demonstrate that it was delayed because of the unionizing attempt.

Similarly, the wage increase took place as normally scheduled. In circumstances where an employer during an organizing campaign departs from its usual practice of granting benefits, the Board may infer an intent to influence the upcoming election and conclude that the employer's conduct violated the Act. *Parma Industries,* 292 NLRB 90 (1988). The General Counsel's case fails here because there is no corroborative proof that past practice was departed from, or otherwise that the air-conditioning of the plant was actually delayed.

C. The Objections to the Election

It is well settled that conduct during the critical period that creates an atmosphere rendering improbable a free choice warrants invalidating an election. See *General Shoe Corp.,* 77 NLRB 124 (1948). Such conduct is sufficient if it creates an atmosphere calculated to prevent a free and untrammeled choice by the employees. As the Board stated, in election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly as ideal as possible, to determine the uninhibited desires of the employees. *General Shoe Corp.,* supra.

As found above, there is merit to Objections 1, 3, 4, 5, 6, 7, and 10 which are coextensive with the alleged 8 (a)(1) violations as found. Section 8(a) (1) conduct interferes with the free exercise of choice and is objectionable unless, it is virtually impossible to conclude that the misconduct could have affected the election result" based on the number of violations, their severity, the extent of dissemination, the size of the unit, and other relevant factors. See *Gonzales Packing Co.*, 304 NLRB 805 (1991).

I conclude, as I did with the 8(a)(1) violations that these objections mirror, that the conduct was unlawful and, as well, interfered with a fair election, potentially affecting all of the employees in their right to make a free and untrammeled election choice that the Board has defined. Birch's conduct destroyed the laboratory conditions so necessary to that choice.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees with wage and benefit losses; by distorting the nature and effect of collective bargaining; by imposing a nonsolicitation rule to prevent employee protected activity at its facility, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 7, Section 8(a)(1), and Section 2(6) and (7) of the Act.

4. By engaging in the above conduct as set out in Conclusion of Law 3 above, Respondent prevented its employees from freely expressing their choice in the election that conducted on April 27, 2000.

5. Respondent did not violate Section 8(a)(3) of the Act by withholding any scheduled wage increase or delaying implementation of air-conditioning in its facility because of the Union's organizational attempt.

Accordingly, I recommend that the election be set aside and a new election be conducted at a time and date to be determined by the Regional Director.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to make the policies of the Act.[28]

Additionally, as indicated above, I have found that the Respondent engaged in objectionable conduct affecting the results of the election in Case 25–RC–9933. I recommend, therefore, that the election in this case held on April 27, 2000, be set, aside, that a new election be held at a time to be established in the discretion of the Regional Director, and that the Regional Director include in the notice of the election the following:

NOTICE TO ALL VOTERS

> The election of April 27, 2000, was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with the employees' free exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this Notice of Election. All eligible voters should understand that the National Labor Relations Act gives them the right to cast ballots as they see fit and protects them in the exercise of this right free from interference by any of the parties.[29]

[Recommended Order omitted from publication.]

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[28] The General Counsel argues for a special remedy in this case citing *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995), and related cases. The argument made is that the violations are so egregious that these special remedies are warranted. I have found the 8(a)(1) violation serious enough to recommend a new election. At the same time, I found no 8(a)(3) violations. Respondent, in opposition to this plea for special remedies argues that special remedy cases feature significant 8(a)(3) conduct which it did not believe was present in this case. See, e.g., *Three Sisters Sportswear Co.*, 312 NLRB 853 (1993), and *Harbor Cruises, Ltd.*, 319 NLRB 822 (1995). I agree with Respondent. Moreover, the discharge of Birch, the *force majeur* of these events further persuades me that the traditional remedies available are more than sufficient to cure any unfair labor practices found, especially where there has been a large employee turnover. These traditional remedies will place the parties on a level playing field in the rerun election that may be conducted.

[29] *Lufkin Rule Co.*, 147 NLRB 341 (1964).